

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 4, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP358

Cir. Ct. No. 2015SC2040

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

CASEY KOBYLINSKI AND APOSTOLIC ADVENTURES, LLC

PLAINTIFFS-RESPONDENTS,

V.

JOSEPH ROSS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County:
ANGELA W. SUTKIEWICZ, Judge. *Affirmed.*

¶1 NEUBAUER, C.J.¹ Joseph Ross appeals pro se from an order denying his motion to reopen a judgment of eviction. Ross asserted, among other

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

things, that the circuit court lacked jurisdiction and that default judgment was entered against him without proper notice. Because the court did not erroneously exercise its discretion in denying the motion, we affirm.

BACKGROUND

¶2 On September 18, 2015, Casey Kobylinski and Apostolic Adventures, LLC, commenced a small claims action against Joseph Ross, seeking eviction and money damages.² September 28 was the return date to either appear in court or file an answer. Ross did not appear on September 28, but filed a copy of the summons and complaint with the following handwritten note: “Notice—All Rights Reserved without Prejudice UCC 1-308 Non-Assumpsit.” The circuit court considered this to be an answer to the complaint, making the case a contested matter. The court scheduled an eviction hearing for October 5 and mailed hearing notices to the parties.

¶3 Ross did not appear at the October 5 hearing. Because of his nonappearance, the court granted default judgment against Ross. The court issued a writ of restitution/eviction, which was returned satisfied on October 15.

¶4 On December 11, 2015, the court set a pretrial conference for January 11, 2016, to determine damages and mailed notices to the parties. Because Ross did not appear at the conference, the court entered default judgment against him for \$310.50 (the damages consisted of \$1 for double rent and statutory costs).

² Apostolic Adventures, LLC, did not file a brief in this appeal.

¶5 On December 1, 2016, Ross moved the court to set aside the default judgment and reopen the case. Ross asserted that he was assured by Kobylinski that, if Ross vacated the property before the October 5, 2015 eviction hearing, the case would be dismissed. Ross claimed that he vacated in late September. He was later surprised to learn that the case was not dismissed and that Kobylinski told the court at the October 5 hearing that Ross had not vacated the premises. Ross argued that therefore the default judgment was entered in error and that he was entitled to present his case on the merits. The court denied the motion for “failure to demonstrate reasonable prospect of success on the merits.” Ross appeals.

DISCUSSION

Standard of Review

¶6 Reopening a default judgment is permitted upon a motion showing good cause. WIS. STAT. § 799.29(1). Whether to reopen a judgment is a decision within the sound discretion of the circuit court, and we will not disturb it unless there was an erroneous exercise of that discretion. ***Kovalic v. DEC Int’l***, 186 Wis. 2d 162, 166, 519 N.W.2d 351 (Ct. App. 1994). If the court’s decision was within the wide band of decisions that a reasonable court could have made, we will uphold it. ***Id.*** Appellate courts generally look for reasons to sustain a discretionary determination. ***Steinbach v. Gustafson***, 177 Wis. 2d 178, 185, 502 N.W.2d 156 (Ct. App. 1993).

¶7 Although the statute does not define “good cause,” it is appropriate to consider the reasons that permit relief from large claim judgments under WIS. STAT. § 806.07(1). Those reasons include “excusable neglect.” Sec. 806.07(1)(a). When seeking relief from a judgment based on excusable neglect, a party must show that (1) the judgment was the product of excusable neglect and (2) there is a

meritorious defense. *Hollingsworth v. American Fin. Corp.*, 86 Wis. 2d 172, 184-85, 271 N.W.2d 872 (1978). “Excusable neglect” is “that neglect which might have been the act of a reasonably prudent person under the same circumstances.” *Id.* at 185 (citation omitted).

¶8 We first note some difficulty in reviewing and fully understanding Ross’ arguments, as they are often incoherent and off point. Courts may afford some leniency to pro se litigants under appropriate circumstances, but fairness and judicial impartiality dictate that courts avoid walking pro se litigants through procedural requirements, directing them to the proper substantive law, or developing their legal arguments. See *Waushara Cty. v. Graf*, 166 Wis. 2d 442, 451-52, 480 N.W.2d 16 (1992) and *Clear Channel Outdoor, Inc., v. City of Milwaukee*, 2017 WI App 15, ¶28, 374 Wis. 2d 348, 893 N.W.2d 24 (courts should not abandon their neutrality to develop arguments for the parties). Pro se litigants “are bound by the same rules that apply to attorneys on appeal” and the right to represent oneself is not a license to ignore or deviate from the rules of procedural and substantive law. *Waushara Cty.*, 166 Wis. 2d at 452.

Ross’ Jurisdictional Challenge has no Basis

¶9 Ross challenges the jurisdiction of the circuit court. He claims that his September 28 handwritten “notice” was not an answer to the complaint, but instead was an immediate challenge to the court’s personal and subject matter jurisdiction, requiring dismissal of the action. We disagree.

¶10 Although lack of jurisdiction may be “good cause” to reopen a judgment, see *Mercado v. GE Money Bank*, 2009 WI App 73, ¶18, 318 Wis. 2d 216, 768 N.W.2d 53, Ross fails to identify any basis for challenging jurisdiction. The record shows that Ross was personally served on September 18, 2015.

Service was further confirmed when Ross filed his answer, which was handwritten on a copy of the summons and complaint. The reference in his answer to section 1-308 of the Uniform Commercial Code (UCC), which Wisconsin codified in WIS. STAT. § 401.308, is inapposite. That statute states that the rights of a party who continues to perform under a contract are not prejudiced, provided the party explicitly reserves its rights. *Id.* Whether or not that commercial transaction statute has any relevance to the merits, we see no relevance to small claims court jurisdiction in an eviction action. *See* WIS. STAT. § 799.01(1)(a) (small claims procedure is the exclusive procedure to be used for eviction actions).

¶11 Moreover, if Ross had a basis to challenge jurisdiction, then he should have advanced that challenge beyond his handwritten off-point reference to the UCC. In this regard, Ross could have asserted and proved his jurisdictional defense in a motion to dismiss or by appearing at the October 5 hearing. *See* WIS. STAT. § 799.20(1) (authorizing a small claims defendant to respond to the complaint by moving to dismiss for, among other things, lack of jurisdiction). Ross did neither.

¶12 Ross' neglect is not the type of conduct of a reasonably prudent person under the circumstances, i.e., it was not excusable neglect. Because Ross has failed to show good cause to reopen the judgment, the circuit court did not erroneously exercise its discretion in denying his motion.³

³ As noted above, even if Ross showed excusable neglect, he would also have to show that he had a meritorious defense. *Hollingsworth v. American Fin. Corp.*, 86 Wis. 2d 172, 184-85, 271 N.W.2d 872 (1978). The circuit court in effect based its denial of the motion on this point when it concluded that Ross did not demonstrate a "reasonable prospect of success on the merits." Because we conclude that there was no excusable neglect, we need not address the meritorious defense factor. *Id.*

Ross was Responsible for any Lack of Notice

¶13 Ross asserts that he did not receive any notices from the circuit court, including notices of the eviction and damages hearings and of the entry of judgment. He points out that several court mailings were returned undeliverable and unclaimed. He alleges that he belatedly learned about the hearings and judgment by looking up the case on Wisconsin's CCAP (Consolidated Court Automation Program, which is an online website that reflects court case information entered by court staff).

¶14 Although lack of proper notice could constitute good cause to reopen a case, Ross himself was responsible for any lack of notice. Ross was served with the summons and complaint at the subject premises, which were located on Geele Avenue in Sheboygan, Wisconsin. This was also Ross' address as identified in the complaint. In his answer, Ross did not indicate any change of, or correction to, the address. The court appropriately used Geele Avenue as the mailing address.

¶15 When Ross vacated the premises around the end of September, he failed to provide the court with any new mailing address. Not until December 15, 2016—more than fourteen months after vacating—did Ross file a “change of address form” with the court.⁴ The form states that the change was effective as of September 29, 2015, but that is of no practical value when the court

⁴ In his reply brief, Ross appears to suggest that he told the court clerk, on September 29, 2015, that he no longer lived at the Geele Avenue address and provided a new mailing address, to which the clerk responded, “[T]hat was fine.” We reject Ross' suggestion. This is the first time Ross asserts this alleged notice to the clerk. Further, there is no support for it in the record. Moreover, given the importance of having current and accurate mailing addresses, an address change should be made in writing, as was eventually done by Ross. Ross gives no explanation as to why he did not use the change of address form in late September 2015.

is first notified of the change more than a year later. It is patently unreasonable for Ross to complain about lack of notice when he failed to timely notify the court of a new mailing address and undertook no other action for more than year, despite his knowing that an eviction case was pending against him. Ross' inaction is not excusable neglect or good cause, and the circuit court therefore did not erroneously exercise its discretion by denying the motion to reopen.

There was no Basis to Consider Ross' Additional Motions

¶16 Ross argues that the court erroneously exercised its discretion in denying additional motions that he filed after his motion to reopen was denied. In this regard, Ross filed a “Motion for Post-disposition Relief and Request of Judicial Transfer” and a “Motion to Compel And Motion for Stay or Abeyance.” We reject the argument. It is unclear from the record that the court denied these motions as opposed to simply not acting upon them. In any event, Ross' motion to reopen the case was the appropriate means for him to be heard on his objections and arguments. That motion had been considered and denied. Ross does not explain by what authority the circuit court could or should have considered his additional motions after judgment had been entered, the case closed, and the motion to reopen denied.⁵

⁵ Ross states that one of the issues is whether the circuit court erred in not allowing Ross an opportunity to present the merits of his case. Other than Ross' arguments discussed above, we do not see where Ross further explains this argument. Therefore, we do not address it. ***Clear Channel Outdoor, Inc., v. City of Milwaukee***, 2017 WI App 15, ¶28, 374 Wis. 2d 348, 893 N.W.2d 24.

Ross' Allegation of Judicial Bias is Devoid of Merit

¶17 Ross alleges that the circuit court judge was biased and that he was entitled to have a different judge assigned to the matter. It appears that the basis for Ross' allegation of bias is simply that the circuit court disagreed with his arguments and denied his motion to reopen. His allegation is devoid of merit. Having already concluded that the circuit court properly exercised its discretion in denying the motion to reopen, we need not further address the allegation.⁶ As for substituting a judge, Ross had the opportunity to request a substitution under WIS. STAT. § 799.205, but failed to do so in a timely manner.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

⁶ Throughout his brief, Ross refers generally to his constitutional rights, particularly due process, suggesting that he has been denied these rights. Ross does not develop any constitutional argument, beyond the arguments already discussed, and rejected, above, e.g., lack of jurisdiction, lack of notice, and judicial bias.

